BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
DONALD E. AND BETTY J. MACINNES)

For Appellants: Donald E. and Betty J. MacInnes, in pro. per.

For Respondent: Crawford H. Thomas
Chief Counsel

John D. Schell
Counsel

O P I N I O N

This appeal is made pursuant to section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Donald E. and Betty J. MacInnes against a proposed assessment of additional personal income tax in the amount of $2,349.10 for the year 1967.

The sole question for determination is whether appellants were California residents in 1967 for purposes of the California Personal Income Tax Law.

In 1966 Braniff Airways, Inc., contracted with the federal government to make military charter flights from Travis Air Force Base in California to Southeast Asia. As a result of this contract appellant Donald E. MacInnes, a Braniff pilot, was transferred from Braniff's Miami base of operations to Travis in August 1966.

During August and the early part of September 1966 appellant either lived in motels or stayed with friends in California while not flying. In September 1966 Mrs. MacInnes rented the family home in Florida and, with their two children, joined appellant in California where they rented a home. About the same time appellant's

mother also joined them in California. In 1967 appellant and his family moved to another home which they occupied pursuant to a three-year lease with an option to purchase.

Appellants' two older children attended California public schools throughout their stay in California. Appellants' third child was born in California during the year under appeal. The children spent their summer vacation in Florida and Mrs. MacInnes made several brief trips to Florida in connection with the rental of their Florida property which remained rented at all times during the period in question.

Appellants obtained California drivers' licenses although they maintained Florida license plates on their automobile. Appellants maintained checking and savings accounts in Florida while Mrs. MacInnes had a checking account in California. Mr. MacInnes was a registered voter in Florida during 1967.

Appellants filed a joint nonresident personal income tax return for 1967. In 1968 they filed a resident return although there was no appreciable change in their circumstances. Respondent determined that appellants were California residents during 1967 and proposed an additional assessment. Appellants protested the deficiency but their protest was denied. From this action. appellants now appeal.

Section 17014 of the Revenue and Taxation Code defines resident as "[e]very individual who is in the State for other than a temporary or transitory purpose." The purpose of this statutory definition is to include in the category of individuals who are taxable upon their entire net income all individuals who are enjoying the benefits and protection provided by the State of California. Excluded from this category are those who are in California merely for temporary or transitory purposes. (Whittell v. Franchise Tax Board, 231 Cal. App. 2d 278, 285 [41 Cal. Rptr. 673]; Cal. Admin. Code, tit. 18, reg. 17014-17016(a).)

The phrase "temporary or transitory purposes" is illustrated in respondent's regulations which provide, in part:

> If, however, an individual is in this State ... for business purposes which will require a long or indefinite period to accomplish, or is employed in a position that may last permanently or indefinitely . . . he is in the State for other than temporary or transitory purposes, and, accordingly is a resident taxable upon his entire net income even though he may retain his domicile in some other state or country.
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> The underlying theory . . . is that the state with which a person has the closest connection during the taxable year is the state of his residence. (Cal. Admin. Code, tit. 18, reg. 17014-17016(b).)

The ultimate question becomes whether appellants were in California for other than "temporary or transitory purposes" during 1967. When all the facts are considered, it must be. concluded that they were,

Pursuant to Braniff's contract with the United States Government appellant was transferred to California by his employer to fly aircraft to Southeast Asia for the duration of the Vietnam conflict. At the time. of appellant's transfer to California in 1966 the duration of the military operations in Southeast Asia was indefinite and remained indefinite throughout the period in question. Thus, appellant, as a Braniff pilot, was employed in a position of indefinite duration.

It is also apparent that during 1967 the state with which appellants had the closest connection was California. Appellant's entire family including his mother moved to California and remained here for over three years. Appellants occupied a home pursuant to a three-year lease with an option to purchase. Appellant spent most, if not all, of his nonflying time in California. Of particular significance is the fact that appellant's two oldest children attended California public schools during the year in question. Their third child was born here. Appellants also acquired California drivers'-licenses and maintained a local bank account.'

On the other hand appellants were able to point to relatively few substantial connections with Florida. They owned taxable real property in Miami which was rented during 1967. Appellants maintained a bank account and licensed their car in Florida. Their children visited Florida during the summer and Mrs. MacInnes made a few trips there in connection with the rental property. Mr. MacInnes was registered to vote in Florida during 1967.

In support of his contention that he is a nonresident appellant argues that he could not register to vote in California during 1967 and that, therefore, any attempt to tax his income would be "taxation without representation" in violation of the federal Constitution. It is a well established policy of this board to refrain from ruling on a constitutional question in an appeal involving a proposed assessment of additional tax. This policy is based upon the absence of any specific statutory authority which would allow the Franchise Tax Board to obtain judicial review of an unfavorable decision. (Appeal of Maryland Cup Corp., Cal. St. Bd. of Equal., March 23, 1970; Appeal of C. Pardee Erdman, Cal. St. Bd. of Equal., Feb. 18, 1970.) Furthermore, we are uncertain of the constitutional provisions on which appellant relies in support of this argument. Additionally, we note that as of August 1967, appellant had been a resident of California in excess of one year and was eligible to vote. (See, Cal. Const., art. II, § 1.) That he did not do so was a matter of personal preference and was not mandated by California law. Under the circumstances, we do not believe that imposition of the California personal income tax on appellant's entire income for 1967 would infringe upon his constitutional rights.

Appellants also imply that respondent should be bound by a determination of one of respondent's employees that appellants were nonresidents in 1967. Only in a most unusual situation will an estoppel be raised against the government in a tax case. The facts must be clear and the injustice great. Here there is no indication of detrimental reliance or injustice since appellants' inquiry was made after the close of the taxable year when liability had already been established. It is our conclusion that under the facts presented here the informal opinion of respondent's employee is not sufficient to

raise an estoppel against respondent. (Anneal of Lee J. & Charlotte Wojack, Cal. St. Bd. of Equal., March 22, 1971; Anneal of Esther Zoller, Cal. St. Bd. of Equal;, Dec. 13, 1960.

In line with the facts and conclusions set out above it is our determination that appellants were in California for other 'than temporary or transitory purposes' and that California was the state with which they had the closest connection during 1967. Accordingly, appellants were California residents for state income tax purposes during that year.

O R D E R

Pursuant to the'views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, -pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Donald E. and Betty J. MacInnes against a proposed assessment of additional personal income tax in the amount of $2,349.10 for the year 1967, be and the same is hereby sustained.

Done at Sacramento, California, this 24th day of October, 1972, by the State Board of Equalization.

John W. Lynch, Chairman

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_____, Member

_____, Member

_____, Member

ATTEST: W. W. Dunlop, Secretary